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No. 139.

IN THE

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1906.

WILMINGTON STAR MINING COMPANY,
*Plaintiff in Error,*
*vs.*
MINNIE FULTON,
*Defendant in Error.*

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## Reply for Plaintiff in Error.

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ATTORNEYS FOR PLAINTIFF IN ERROR

BARNARD & MILLER, PRINTERS, CHICAGO

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## REPLY FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

In replying to the argument for defendant in error we shall adopt the same numerical headings which were used in that argument, taking up the questions in the order there discussed.

## I.

### THE MOTION TO DISMISS.

We have already replied under separate cover to defendant in error's motion to dismiss for want of jurisdiction and pointed out that this motion is based upon a misconception of that clause of Section 5 of the Court of Appeals Act of March 3, 1891,

which gives this court jurisdiction to review cases brought direct from the Circuit Court in which the "constitution or law of a state is claimed to be in contravention of the Constitution of the United States," whereby this court's jurisdiction is made to depend upon the existence of a *bona fide claim* of such contravention and not upon the *soundness* of plaintiff in error's views upon such constitutional question. The confusion of thought in which counsel have fallen upon this point is even more clearly demonstrated in the resume of their argument on this point, found at pages 23 and 24, where they say: "We therefore contend that if this first count is found by the court to be based upon Section 19 and that section is held to be not repugnant to the Constitution of the United States, as contended for by plaintiff in error, then, there being no substantial constitutional question involved in this dispute necessary to its determination, the writ of error should be dismissed and the judgment of the trial court affirmed." In other words, upon counsel's own statement of their position, this court must first pass upon the controverted question whether or not the first count is based upon Section 19 of the Mining Act and must next pass upon the further controverted question whether or not such section is repugnant to the Constitution of the United States (as it necessarily would be if the entire act is unconstitutional, as claimed by plaintiff in error), before it is in a position to pass upon the question of dismissing this writ of error. The answer to this position has already been given by this court in *Penn Ins. Co.* v. *Austin,* 168 U. S., at 695:

"The contention here made, however, is not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument then in effect is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. *But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case.*"

## II.

THE CONSTITUTIONALITY OF THE ILLINOIS MINING ACT.

Upon the first trial of this case it was taken from the jury under the following instruction from the court appearing in the record of the case in the Court of Appeals; "Gentlemen, the court holds on this motion to take the case from the jury that the plaintiff has failed to make out a case of willful negligence and cannot maintain this action, and you are instructed to find for the defendant." The Court of Appeals reversed the case (133 Fed., 193) upon the ground that there was evidence of willful negligence on the part of defendant which should have gone to the jury. In discussing the question which defendant raised in that court as an additional reason for affirming the judgment, that the Illinois Mining Act did not fix a liability upon the owner for the violations complained of in that case, and that to otherwise construe the act would be to render it unconstitutional, the court used the language quoted by counsel at pages 10-11 and 29 of

their brief. The error into which the court there fell and which has been adopted by counsel in their statement at page 29, "if the choice of the employer was limited *as in the Pilot Cases* to the *first* individual presenting himself for employment, etc.," was that of assuming that the Pilot Laws in question compelled the employment of the first pilot who hailed the vessel. As a matter of fact no such obligation was imposed by the New York Pilot Law of 1857, Chapter 243, which was before this court in *Homer Ramsdell Co.* v. *LaCompagnie, etc.,* 182 U. S. 406, and which is set out in full in a note on page 409 of that case. This same Pilot Act was before the New York Court of Appeals for construction in *Gillespie* v. *Zittlosen,* 60 N. Y., 449, involving the attempt of the first pilot who had hailed a certain incoming vessel to recover pilotage by reason of the fact that the master of the vessel had refused to take him and had taken another licensed pilot in his place. The court in an opinion by Chief Justice Church expressly held that there was no obligation upon the master to take the first pilot who offered himself, but that he could take any licensed pilot without being subject to the penalty imposed by the Pilot Act, and this opinion was reaffirmed by the court upon petition for rehearing. The case settled the meaning of the Pilot Act of 1857 upon this point, and that case was before this court in its consideration of the *Homer Ramsdell Co.* case and was referred to by this court at page 411 of its opinion, so that its ruling that the employment of a pilot under this New York statute was compulsory and relieved the master of the vessel from liability for negligence on the part of the pilot, must have involved

the proposition that such employment is compulsory even where there is a class of persons to choose from. As the majority opinion of the Court of Appeals quoted by counsel at page 29 of their argument was thus based upon a misconception of this Pilot Law, it is not entitled to the weight which would otherwise be accorded it.

Counsel further refer in support of their argument to the case of *Sherlock* v *Alling, Adm'r,* 93 U. S., 99. But as this case was also considered by this court in the *Homer Ramsdell Co.* case, *supra,* at page 416 of that opinion, and held to be inapplicable to the question of exemption from liability because of compulsory employment, which was then under discussion, we shall for the same reason disregard it.

The analogy between the position of the vessel master under this pilot statute and the mine owner under the Illinois Statute is evident. The mine owner is not required to employ the first manager, examiner or hoisting engineer who presents himself, but may choose from the limited number holding state certificates. He is, however, under penalty to employ one of each of these officials for the reason that it is impossible for him to operate his mine without them, and the Mining Act expressly makes it unlawful to employ any but a certificated official. But the Illinois Act goes further even than the Pilot Act for it not only requires that the mine official shall satisfactorily pass an examination upon specified subjects, and thus be generally competent to do his work, but also imposes upon him specific and positive duties in connection with the examination

and operation of the mine which find no counterpart in the Pilot Act. It is to be further remembered that it is not sought in this case to recover for mere negligence charged against the mine official, as was the case in the pilot suits, but for *willful violations* of specific duties defined in terms in the act and placed upon the mine officials. Upon every consideration, therefore, the claim of the mine owner for immunity in this case is far stronger than that of the shipmaster under the Pilot Laws. To make the analogy complete it will be necessary to assume a case in which the pilot statute in addition to its usual provisions directed, for example, every pilot who qualified under it, never to take his vessel within 500 feet of any sunken rock known by him to exist in a harbor and visiting penalties upon him for wilfully disobeying this direction. If, notwithstanding such prohibition, a pilot should wilfully steer the vessel within the prescribed area and personal injury should result, and the ship owner should then be held liable for such injuries, the exact injustice which results from the judgment in the case at bar would then be made to appear in the supposed case arising under the Pilot Law.

The citation from Huffcutt appearing at page 14 of counsel's brief is based upon the English case of *Martin* v. *Temperley,* 45 Eng. Com. Law Reports, 295. But in that case Justice Coleridge said, in finding in favor of the judgment against the master:

> "First, the men were selected by the defendant; secondly, they were paid by him; thirdly, they were doing his work, fourthly, *they were under his control,* that is were doing the work

> in the ordinary way. * * * The men here were as much under the defendant's control as a gentleman's coachman is under his master. The master cannot order the coachman to do an illegal act, as to drive furiously or on the wrong side, but subject to that the master has control over the coachman; so here the defendant had the control over the men navigating the barge subject to the rules of the river."

Under the Illinois Mining Act, on the contrary, the mine owner is absolutely deprived of the control over the mine officials, while the mine is in operation, as to those matters specifically placed under the direction of these officials by the statute, and it was for the violation of one or more of these specific duties that this suit was instituted.

Furthermore, the case of *Martin* v. *Temperley* is questioned in Sherman and Redfield on Negligence, 5th Ed., Vol. 1 at page 255 as inconsistent with the rule in *Quarman* v. *Burnett,* 6 N. & W., 499, which is generally recognized and followed. In that case Baron Parke said, page 509-510:

> "Upon the principle of *qui facit per alium facit per se* the master is responsible for the acts of his servant and that person is undoubtedly liable who stood in the relation of master to the wrongdoer,—he who had selected him as his servant from the knowledge of or belief in his skill and care and who could remove him for misconduct and *whose orders he was bound to receive and obey.* * * * *But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist."

We shall discuss this question somewhat further in connection with the question of vice principal raised by counsel.

In the case at bar no question arises of *incompetency* on the part of the mine officials guilty of the violations charged or of the retention by the owner of officials who were known to be incompetent, or with notice of whose incompetency the owner was chargeable. There is no suggestion in the record that up to the moment when Fulton was permitted to go into the gaseous west entry where he lost his life, either Wilson, the mine manager, or Pierrard, the mine examiner, had ever been guilty of a single act of disobedience or even indiscretion. On the contrary the evidence so far as it goes shows that these men had always performed their duties as required by law. It is no answer, therefore, to the charge that this was a compulsory employment to show, as counsel undertake to do by the *Seniger* case, 179 Ill., 370, that the defendant was under no obligation to retain Wilson or Pierrard in its employment, for no ground of discharge whatever appears in this case.

We add the following authorities to those already cited in support of our contention that the obligation upon the mine owner to employ certificated mine officials having prescribed duties, under penalty of fine and imprisonment, constitute compulsory employment and that to hold the mine owner liable, not for the *mere negligence* of these officials, but for their *wilful violation of positive duties imposed upon them,* is contrary to a principle of natural notice and hence violates any statute of which it forms a part.

It was held in *The China,* 7 Wall., 53, that the New York Pilot Act of 1857, the same one which

was under consideration in the *Homer Ramsdell Co.* case, a compulsory pilot was imposed. In support of this Mr. Justice Swayne refers to Dr. Lushington's opinion in *The Maria,* and uses the following language, p. 60:

> "Suppose the New York Statute, in the event of a refusal to take a pilot on board, instead of full pilotage had given the vessel or cargo to the pilot. Whether the amount to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact but in *the degree* of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is, that he would have had the same option if the consequence had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined, and an obligation is imposed. The alternatives presented are to receive the pilot; or to refuse and take the consequences."

In deciding the case of *The Maria,* 1 Robinsons' Ad. Rep., at page 106, Dr. Lushington observes:

> "Now I am of opinion, that independently of the express provisions in those statutes, the compulsory taking of a pilot does *upon general principles* relieve the owner from all responsibility for his acts. Observe the expression of Mr. Justice LeBlanc," (one of the judges in *Carruthers* v. *Sidebottom*) "'Independent of the general principle, the Pilot Act provides,' etc. Although, therefore, his judgment was founded upon the opinion that the 55th section did apply to the Liverpool Act in the particular case he was deciding, he clearly recognized the general principle, and *this principle is one that is recognized by common sense and justice all*

*over the world.* Supposing, then, the General Pilot Act not to apply in this case, is not the general principle alone sufficient to exonerate the owners? I think it is, and for this reason: upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another, the principle upon which liability depends wholly fails."

"If the master is by statute compelled to take a pilot the owners are not responsible for his acts while the vessel is under his control. The reason for the distinction is this. The owner is responsible for the acts of the master and crew because they are his agents selected and appointed by him, and he is bound to provide persons of adequate skill, diligence, industry and sobriety for the proper management of the vessel. For the same reason he is responsible for the acts of any person to whom the master voluntarily entrusts the navigation of the ship but if the owner's authority is superseded by legislative authority and a person is put on board whose qualifications the owner does not decide upon, *but whose qualifications are determined by others* it is only conformable *to a principle of natural justice* to hold the owner exempted from responsibility for the acts of such person." Curtis on Maritime Law, 195-6.

We concede that it has for many years been the policy of the State of Illinois to safeguard the persons and lives of its miners, and that that policy is a most beneficent one, but we deny that it is right or desirable for the State of Illinois to safeguard one class of its citizens, viz., coal miners, by imposing unjust restrictions and obligations upon another class of its citizens, viz., coal mine owners. There is no force in counsel's argument that the

adoption of plaintiff in error's theory as to the unconstitutionality of the Illinois Mining Act will upset and nullify ~~this~~ quite beneficent policy of the state, for the reasons; first, if that policy is based on injustice towards certain members of the state community whereby other members are benefited at their expense, then the state policy ought to be done away with; and, secondly, that it is entirely possible to enact and carry into effect legislation having for its object the safeguarding of miners without creating any unjust restrictions or discriminations against other classes of citizens. We concede the great desirability of *some* legislation in behalf of those who are compelled to earn a livelihood by laboring in the coal mines of this state, but deny that the particular legislation now under consideration is a just or proper method of securing the desired result.

Counsel's view appears to be that one of the proper and beneficent purposes of legislation upon this subject is to furnish the injured miner with a claim against a financially responsible defendant, but we are unwilling to concede that the police power of the state under which this Mining Act was confessedly enacted, goes to that extent. So far as it provides examinations and prescribed duties which are reasonably designed to *prevent* injuries to mine operatives, it travels within the recognized limits of police legislation, and it seems clear that the placing of civil and criminal penalties and liabilities directly upon those officials in the mine whose violation of the specific duties imposed would result in injury to the miners, is a proper method

of insuring such *prevention* of injury by arousing these officials to a keener sense of duty. But, as we have already pointed out in our original brief, it does not tend to *prevent* such injuries to fix a civil liability for injury upon the owner of the mine, who can have no personal supervision over the miners' labors in the mine unless he actively officiates in all the positions of inspector, manager, examiner and hoisting engineer created by the statute, and this it is a practical impossibility for him to do by reason of the manifold and contemporaneous duties required of these officials as we have already shown.

In *Millett* v. *The People*, 117 Ill., 294, the court say, page 303:

> "Undoubtedly if these sections fall within police power they may be maintained on that ground; but it is quite obvious that they do not. Their requirements have no tendency to insure the personal safety of the miner or to protect his property or the property of others. They do not meet Dwarris' definition of police regulations. They do not have reference to the comfort, the safety or the welfare of society. (Potter's Dwarris on Statutes, 458.) In *Austin* v. *Murray*, 16 Pick., 121, it was said: 'The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation.'" Citing further *Watertown* v. *Mayo*, 109 Mass., 315; *Matter of the application of Jacobs*, 98 N. Y., 109; *People* v. *Marx*, 99 N. Y., 377.

The court proceeds to point out that mining for coal is in no way affected with a public use so as to permit its regulation by law like a public warehouse, and says further, page 304:

"We are not unmindful that our constitution in Sec. 29, Art. IV, enjoins legislation in the interest of miners, but this is solely as respects their personal safety—the enactment of police regulations to promote that end."

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

*Matter of Jacobs,* 98 N. Y., 110.

## III.

### CONSTRUCTION OF THE MINING ACT BY THE SUPREME COURT OF ILLINOIS.

Under this heading counsel argue, and are supported in their arguments by statements of the Supreme Court of Illinois, that under the Illinois Mining Act the mine manager, examiner and hoisting

engineer are *vice principals* of the owner, and repeated reference is made to the fact that the mine owner should not be permitted to *delegate to these mine officials* the statutory duties imposed by the act. This whole argument, and we submit that of the Illinois court upon which it rests, is based upon a total misconception of the true relationship which constitutes one man the vice principal of another. If, as we have already contended, this Mining Act means what it plainly says, and imposes upon the mine officials and upon no one else the duties whose violation are complained of in this action, then it is impossible to conceive of these duties as being delegated to the mine officials by the mine owner, for, plainly the mine owner never was burdened with them, and it is therefore impossible to put in force as against this defendant the doctrine of *respondeat superior* upon which alone defendant's liability can be made to rest.

In Sherman & Redfield on Negligence, 5th Ed., Vol. 1, Sec. 231, the New York law on the subject of vice principal as established in *Crispin* v. *Babbit*, 81 N. Y., 516, is referred to, and it is further said:

> "Under this rule a vice principal is one to whom is deputed the discharge of some duty or the exercise of some power *which belongs to the master as such*, and he does not act as a vice principal when engaged in any work which does not pertain to the duty or peculiar powers of the master; just as an agent does not act as an agent when doing some act entirely outside of his agency but who may be at the same moment a vice principal as to one duty and a fellow-servant as to another."
>
> "There must then be some principal which limits and defines the rule, *respondeat superior*.

And we think it may be clearly seen and stated. It is this: *the responsibility of a master grows out of, is measured by and begins and ends with, his control of the servant* * * * The master is responsible for what is done by one who is his servant in fact, for the reason that he has such servant under his constant control and may direct him from time to time as he sees fit and therefore the acts of the servant are the acts of the master, because the servant is at all times only an instrument, and *is not liable for a person who is a servant only by construction, excepting so far as this essential element of control and direction exists between them.*"

1 Parsons on Contracts, Fourth Edition, *pages 102-4.

"In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which *is charged upon the master and delegated to the servant.* In other words, whether the servant has been put in the place of the master as to the particular service performed or omitted."

*The New Pittsburg Coal & Coke Co.* v. *Peterson,* 136 Ind., at 403.

"The controlling consideration in determining whether an employe is a vice-principal is not his comparative rank, not his authority to command, and not his authority to employ and discharge, but whether he is the representative of the master in respect to those duties which the master cannot escape by a delegation of them." Citing numerous authorities.

*Southern Ind. R. R. Co.* v. *Harrell,* 161 Ind., at 695.

"The duty of the operator or agent is to employ a competent mine boss according to the

provisions of the statute, and when he has done so he has discharged his duties to his employes in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from negligence of the mine boss, *who is not a vice-principal, as his duties are not delegated to him by his employer, but are prescribed by statute.*"

*Williams* v. *Thacker Coal & Coke Co.*, 40 L. R. A., 812.

"One who has not the authority of a general vice principal may be intrusted by the master with the discharge of absolute personal duties that rest upon it, such as the duty to use reasonable care to employ competent and careful fellow-servants, and in such a case he may be termed a special vice-principal. He stands in the place of the master when he is discharging one of these personal duties of the master, and the latter is liable for his negligence in the discharge of it; but in the performance of his other services as a general employe he is not the representative of the master, nor is the master liable for his negligence in the performance of them. Whether or not the master is liable for the negligence of such a servant in a given case must be determined by the nature of the duty in the performance of which he was guilty of the negligence. If he was engaged in discharging an absolute duty of the master, the latter is liable; otherwise it is not. *Railroad Co.* v. *Baugh*, 13 Sup. Ct. Rep., 914, 919, 921; *Coal Co.* v. *Johnson*, 56 Fed. Rep., 810; *Brown* v. *Winona & St. P. R. Co.*, 27 Minn., 162, 165, 166, 6 N. W. Rep., 484; *Brown* v. *Minneapolis & St. L. Ry. Co.*, 31 Minn., 553, 18 N. W. Rep., 834."

*City of Minneapolis* v. *Lundin*, 58 Fed. Rep., at 527.

We agree with counsel that the construction by the highest court of the state of a statute of that state is as conclusive and binding as the text of the law. But it does not follow that the decision of that court upon the question whether the statute contravenes the Constitution of the United States is binding upon the United States Supreme Court. We also agree with counsel in their view as to the meaning of the word "willful" under the Illinois statute, and we have invoked that meaning in our original brief in discussing the action of Fulton in entering the gaseous west entry of the mine in which he met his death.

In view of the evidence quoted by counsel at page 31 of their argument, and other testimony, it may have been entirely proper to find the mine manager, Wilson, and the mine examiner, Pierard, guilty of willful violation of the statute, but it is only by resort to a doctrine of *imputed willfulness* that the mine owner can be charged with such disobedience. The mine was equipped in all respects as required by law, the mine officials had been selected from those designated by the act, and no charge of previous misconduct which could put the owner on notice of possible future misbehavior is made in this case. The action of these officials which caused the accident, according to plaintiff's contention, could not have even been anticipated, much less known, by the owner, so as to have prevented it, and the owner was powerless in the premises, at the best. To hold the owner guilty of a *willful* act or omission of any description in this case is to pervert the meaning of that term.

## IV.

### PROXIMATE CAUSE.

Under this heading counsel say, at page 32, in reference to Wilson's command to Fulton to enter the west roadway:

> "We cannot see how this act of Wilson's standing alone could have caused Fulton's death. It is only when taken in connection with his failure to clear the mine from gas, that the order of Wilson has any bearing on the case."

This quotation indicates that counsel have misapprehended our argument, as we have never claimed that Wilson's action, by itself, could have caused Fulton's death. The question of proximate cause could not arise under such circumstances, for it is only in connection with other acts, usually negligent, that reference is had to the doctrine of proximate cause.

Counsel's answer to our argument under Section II of our original brief appears to be that the real proximate cause of this accident was defendant's negligence in permitting gas to accumulate in the mine, and not the act of Wilson in ordering Fulton into the mine. That, however, was a question *for the jury,* as the trial court recognized in instructing the jury (Rec., 97), that if they believed Wilson's order to have been the proximate cause of Fulton's death, then the plaintiff could not recover. Our whole complaint upon this point is that the question was not properly submitted to the jury by reason of the erroneous definition of proximate cause subsequently announced by the court. Had the court in-

structed the jury properly upon this point, it might have found, in accordance with counsel's contention, that the gaseous condition of the mine, and not Wilson's order, was the proximate cause of death. But the question now under consideration is not *what was, in fact, the proximate cause of Fulton's death,* but *whether or not the jury was so instructed as to the meaning of proximate cause that they could intelligently decide that question upon the evidence before them.*

We submit upon our former argument that error was committed in this matter by the trial court, and that such error was prejudicial. Upon the prejudicial nature of this and other error appearing in this record, see *Inman Bros.* v. *Dudley & Daniels Lumber Co.,* 146 Fed. Rep., at 452 (advance sheets):

> "The defense now made for this ruling is not that the court did not misconstrue the contract and commit error in excluding evidence of actual cut of mill, but that the error was harmless, and therefore not ground for reversal. *That error is always presumed to be prejudicial is elementary.* Nevertheless, it is an established rule in error proceedings that error which is not prejudicial will not justify a reversal. But in *Deery* v. *Cray,* 5 Wall., 796, 807, 18 L. Ed., 653, the court said that 'when the application of this rule is sought it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.' This language has more than once been repeated in subsequent cases (*Vicksburg, etc., R. R.* v. *O'Brien,* 119 U. S., 99, 7 Sup. Ct., 118, 30 L. Ed., 299), and was applied by this court in *Standard Life Insurance Co.* v. *Sale,* 121 Fed., 666, 57 C. C. A., 418."

## V.

### CONTRIBUTORY NEGLIGENCE.

We concede for the purposes of this argument that ordinary contributory negligence would not be a defense to this action under the construction placed upon the Mining Act by the Illinois Supreme Court, and we have not contended otherwise. We endeavored upon our original argument under Section IV to plainly point out the contention which we do make upon this point, viz.: that *willful* conduct on the part of plaintiff or actions which were taken in *reckless disregard of consequences,* in view of known surroundings, and which contributed to plaintiff's death, should be a defense to *willful* conduct on the part of the defendant. This question has never been passed upon, so far as we are advised, by the Illinois Supreme Court, and is open to decision in this case, being squarely presented by evidence of conduct on the part of the plaintiff's decedent which, under the definition of willfulness invoked by counsel for defendant in error, is quite as willful as any act charged against the defendant.

## VI.

### THE COURT'S REFUSAL TO GIVE DEFENDANT'S REQUESTED INSTRUCTION (Rec., 107) BASED UPON SECTIONS 31 AND 33 OF THE STATUTE.

We confess to an inability to see the pertinency of counsel's reply to our contention upon this point. We do not understand that it is necessary for the

court in giving instructions in a case predicated solely upon a state statute to refer to that statute in each of its instructions. However, this instruction begins with the words, "You are instructed that *under the laws of this state in force at the time of Samuel Fulton's death,* it was unlawful, etc." It is further said that the instruction fails to describe the particular character of willful act referred to, but the instruction was as explicit as the statute itself upon this point, and quite as explicit as the circumstances of the case called for. There was evidence in the record setting forth fully and minutely the circumstances under which Fulton entered the west entry, and it was for the jury to decide whether that evidence showed conduct on Fulton's part which amounted to a willful act which endangered the lives or health of persons or property in the mine.

## VII.

### ONE GOOD COUNT NOT SUFFICIENT TO SUSTAIN THIS JUDGMENT.

Counsel seek to divert attention from the seven counts which admittedly involved the troublesome constitutional question in this case, and to fix the court's attention upon the first count as being one free from criticism and sufficient in itself to carry this case through to an affirmation of judgment, irrespective of errors that may have been committed in connection with the other counts. It is, however, an undeniable fact that many separate issues are involved in this case, as many, at least, as the number of counts upon which the action proceeded. It

is also an undeniable fact that the verdict was a general one. It is impossible, therefore, to tell upon which of the issues tendered the jury reached its verdict. Under such circumstances it is famiilar law that if upon any one issue error was committed, the verdict cannot be upheld.

> "On the trial evidence was introduced bearing upon the issues and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."
>
> *Maryland* v. *Baldwin*, 112 U. S., at 493.

> "The risk of this act of negligence is one of the risks which the plaintiff voluntarily assumed when he entered upon his employment, and as the court erroneously instructed the jury that the defendant was liable for this act, if it was negligent act, and if Ford was a vice-principal, we cannot say that the verdict was not affected by this error. The verdict was general and its generality prevents us from discovering upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried and upon any one of them error is committed in the admission or rejection of evidence or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. *State of Maryland* v. *Baldwin*, 112 U. S., 490."
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> *What Cheer Coal Co.* v. *Johnson*, 56 Fed. Rep., at 813.

Defendant requested an instruction as to each of the last seven counts, as well as to the first, that no recovery could be had thereunder, for the reason that it was based upon a statute which was contrary to the Constitution of the United States. (Rec., 105, 106.) It further requested instructions as to the second and third counts that no recovery could be had thereunder, it appearing without contradiction in the evidence that the mine in question was a "long-wall" mine in which crosscuts and stoppings were wholly unknown, and could not, therefore, have been contemplated by the Act; as to the fifth count, that no recovery could be had thereunder, for the reason that under a proper construction of Section 18 (b) of the Act, plaintiff's intestate entered the mine to work therein under the direction of the mine manager, and also that if the jury believed from the evidence that the defendant Fulton just before the time of his death entered the mine to work therein under the direction of the mine manager, Wilson, then the jury should find the defendant not guilty; and as to the sixth count, that under a proper construction of Section 16 (b), it had no application to the defective machinery shown in evidence in the case. (Rec., 102, 103, 107.) Defendant further moved to strike out each of these last named counts upon the grounds above stated. (Rec., 61.) Defendant further requested instructions that plaintiff's intestate could not recover if he was engaged at the time of his death in a willful act which endangered the lives or health of persons working in the mine or the security of the mine or its machinery, if such willful act contributed to his death, and that

he could not recover if his death resulted in part from his reckless disregard of consequences in view of his surroundings, etc. (Rec., 107.) All of these requested instructions and motions raised questions of law applicable to the several issues tendered by the last seven counts, and all of them were refused by the court. Likewise the court's instruction that plaintiff could recover against the defendant if the mine manager or the mine examiner were found to have willfully violated any provision of the Mining Act declared on in any count in the declaration (Assignts. of Error, 8, 9 and 10; Rec., 112, 113) raised a question of law applicable to each of these issues. If, therefore, we assume, for the sake of the argument, that plaintiff's contention is sound, that the first count is unassailable on constitutional or other grounds, we still have the exact situation referred to by the foregoing authorities, viz.: a general verdict returned upon several issues with the impossibility of determining upon which one or more of the issues the jury found for the plaintiff; and if, therefore, the court erred as to any one of the instructions or motions so requested and refused, or as to the instructions so given, this judgment must be reversed, irrespective of the merits of the first count, as it may be that such erroneous act on the part of the court caused the jury to make the finding which it returned.

Respectfully submitted.

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